92-1630

No. 93-_____

In The
Supreme Court of the United States

October Term, 1992

LOMAS MORTGAGE USA,
GMAC MORTGAGE CORPORATION,
GOLDOME REALTY CREDIT CORP,

Petitioners,

vs.

DANIEL WIESE and SUE ANN WIESE,
NOEL CERVANTES and ARNEL CERVANTES,
MARK SAUGSTAD and KATHLEEN SAUGSTAD,

Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May debtors in a Chapter 13 bankruptcy case use 11 U.S.C. Section 506(a) to reduce the secured claim upon their residence to the fair market value of the residence and treat the balance of the mortgagee's claim as an unsecured claim without violation of 11 U.S.C. Section 1322(b)(2)?

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REFERENCE TO REPORTED OPINIONS

The opinion of the Court of Appeals is reported under the name Lomas Mortgage USA v. Wiese, at 980 F.2d 1279 (9th Cir. 1992) and at 61 U.S.L.W. 2364. No opinion was designated for either official or unofficial publication in Goldome v. Saugstad or GMAC v. Cervantes. Neither the District Court nor the Bankruptcy Court designated their decisions for publication in any official or unofficial reporter in any of these cases.[1]

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[1]The only interested party in these cases not named in the caption is the Federal National Mortgage Association, which is the actual owner of the note and deed of trust involved in the Wiese and Cervantes cases. Goldome Realty Credit Corp is now know as Keycorp Mortgage, Inc. No party to the appeal has any non-wholly owned subsidiaries. The parent of Lomas Mortgage USA is Lomas Financial Corp. The parent of Keycorp Mortgage, Inc. is Keycorp Capital. The parent of GMAC Mortgage Corporation is General Motors.

STATEMENT OF GROUNDS OF JURISDICTION

These cases present the same question as that presented in Nobelman v. American Savings Bank, Cert. granted 61 U.S.L.W. 3418 (U.S. December 7, 1992) (No. 92-641).

In Lomas Mortgage USA v. Wiese, the Court of Appeals entered its judgment on December 4, 1992. In Goldome v. Saugstad, and GMAC v. Cervantes, judgment was entered on December 10, 1992. No rehearing was sought in any case. The Supreme Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

§ 506. Determination of Secured status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

§ 1322. Contents of plan

. . .

(b) Subject to subsections (a) and (c) of this section, the plan may--

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal

residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(10) include any other appropriate provision not inconsistent with this title.

STATEMENT OF THE CASE

The material facts in each of these cases are identical. In each case, the respondents are debtors in Chapter 13 cases filed in the District of Alaska. In each case, the petitioner is the beneficiary or servicing agent[2] of the beneficiary of the deed of trust against the respective respondents' residences. And in each case, due to a downturn in the economy of the Anchorage, Alaska area, the value of the residence securing the deed of trust declined to where it was worth

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[2]In the Lomas and GMAC cases, the petitioner is the servicing agent for the Federal National Mortgage Association. A servicing agent collects the mortgagor's monthly payments, remits the principal and interest portion of the payment to the actual mortgagee, pays taxes and insurance out of the reserved portion of each payment, and deals with the mortgagor on the mortgagee's behalf, including taking steps to protect the mortgagee's interest should the mortgagor file bankruptcy.

less than the amount owing on the deed of trust at the time the respondents filed their Chapter 13 petitions.

Respondents Daniel and Sue Ann Wiese filed their Chapter 13 petition on January 25, 1990. At that time, the balance owing on the deed of trust against their residence was approximately $155,000, and they were in default for seven monthly payments. An appraisal established a value of the residence to be $145,000, without adjustment for septic system problems. From this value the Bankruptcy Court deducted $24,500 for transaction and septic system repair costs to arrive at a value of $120,500 for Lomas's secured claim.[3] The remainder of the principal balance, plus accrued interest and late

[3]The deduction of these costs was later reversed on appeal.

charges, was treated as an unsecured claim to share pro rata in the respondents' Chapter 13 plan payments on all unsecured claims. The lien of the deed of trust was also avoided to the extent it exceeded $120,500.

Respondents Noel and Arnel Cervantes filed their Chapter 13 petition on September 6, 1989. At that time, the balance owing on the deed of trust against their residence was approximately $76,000, and payments were current. The value of the residence was agreed to be $33,000, which the Bankruptcy Court allowed as the amount of GMAC's secured claim. The remaining $43,000 was allowed as a general unsecured claim to share pro rata in the respondents' Chapter 13 plan payments on all unsecured claims. The lien of the deed of trust was also avoided to the

extent it exceeded $33,000.

Respondents Mark and Kathleen Saugstad filed their Chapter 13 petition on November 27, 1989. At that time, the balance owing on the deed of trust against their residence was approximately $125,000, and they were in default for ten monthly payments. The value of the residence was agreed to be $87,000. From this value the bankruptcy court deducted $5,910 for transaction costs to arrive at a value of $81,090 for Goldome's secured claim.[4] The remainder of the principal balance, plus accrued interest and late charges, was treated as an unsecured claim to share pro rata in the respondents' Chapter 13 plan payments on all unsecured claims. The lien of the deed of trust was

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[4]The deduction of these costs was later reversed on appeal.

also avoided to the extent it exceeded $81,090.

In each case, the effect of the Chapter 13 plan and the Bankruptcy Court's confirmation order was to drastically modify the petitioners' rights as to the portions of their respective claims deemed unsecured, as this portion of the claim would be paid less than in full and without interest. Avoidance of the unsecured portion of the deed of trust lien also deprived petitioners of the benefit of any appreciation in value after the date of the confirmation order. Viewing these modifications of their rights as contrary to the provisions of 11 U.S.C. § 1322(b)(2), as creditors' whose claims are secured only by real property that is the debtors' principal residence, petitioners appealed the confirmation of

respondents' plans.

Federal jurisdiction in the court of first instance, the Bankruptcy Court for the District of Alaska, was based on 28 U.S.C. Section 1334(a), which vests in the District Courts jurisdiction over all cases arising under Title 11, and 28 U.S.C. § 157(a), which provides that the District Court may refer all Title 11 cases to the Bankruptcy Judges for the District. Jurisdiction over the petitioners' initial appeal was vested in the District Court under 28 U.S.C. § 158(a), and in the Court of Appeals under 28 U.S.C. § 158(d).

ARGUMENT

These cases present the same question as that presented in Nobelman v. American Savings Bank, Cert. granted 61 U.S.L.W. 3418 (U.S. Dec. 7, 1992) (No. 92-641). As

in that case, certiorari is appropriate because of the conflict among the decisions of the Courts of Appeals, and because the Court of Appeals for the Ninth Circuit has in these cases decided a federal question in a way that conflicts with the applicable decisions of this Court.

The Court of Appeals for the Fifth Circuit held in Matter of Nobleman [sic], 968 F.2d 483 (5th Cir. 1992), that 11 U.S.C. § 1322(b)(2)'s prohibition on modifying the rights of the holder of a claim secured only by real property that is the debtor's principal residence included that portion of the claim that would be considered an unsecured claim under 11 U.S.C. § 506(a).[5] The opposite

[5]Statutory citations are to U.S. Code Title 11 unless otherwise noted.

result has been reached in four circuits. In re Hougland, 886 F.2d 1182 (9th Cir. 1989) (reaffirmed in Lomas v. Wiese, supra); Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123 (3rd Cir. 1990); In re Hart, 923 F.2d 1410 (10th Cir. 1991); Bellamy v. Federal Home Loan Mortgage Corp., 962 F.2d 176 (2nd Cir. 1992). Additional cases are believed to be pending in the First and Fourth Circuits. Bankruptcy Courts in the remaining circuits are also split.

There is no way of reconciling these decisions. The Fifth Circuit held that the specific protection afforded by § 1322(b)(2) to the claims of residential mortgagees controlled over the general power to bifurcate claims contained in Section 506(a). 968 F.2d at 488. The court also noted that Section 1322(b)(2)

refers to modifications of the rights of holders of claims, rather than to modification of the claims themselves, so that it can be read as excepting from its reach the entire claim of the residential mortgagee even if the entire claim is not a secured claim as defined by Section 506(a). Id.

The Second, Third, Ninth, and Tenth Circuits, on the other hand, hold that the residential mortgagee's claim is analyzed first under Section 506(a) to determine its secured and unsecured components, and the protections of Section 1322(b)(2) are then applied only to the secured portion. E.g., Bellamy, 962 F.2d at 179. These courts read Sections 506(a) and 1322(b)(2) as being harmonious, thus allowing them to avoid application of the rule that the specific controls over the general. Other

courts have characterized this analysis as "strained and unconvincing." In re Nobelman, 129 B.R. 98, 101 (N.D. Tex. 1991). It has also been criticized as rendering Section 1322(b)(2) "essentially meaningless." In re Hart, 923 F.2d at 1417 (Brorby, J., dissenting).

Despite the Constitution's command that Congress pass only "uniform laws on the subject of bankruptcies," Constitution, Article 1, Section 8, Clause 4, these irreconcilable positions taken by the Courts of Appeals and lower courts among the various circuits have resulted in anything but a uniform application of this part of the Bankruptcy Code. Certiorari is therefore appropriate to resolve this conflict.

The decisions of the Ninth Circuit in these cases, as well as the decisions of

the other circuits that permit stripdowns, also conflict with the decision of this Court in Dewsnup v. Timm, --U.S.--, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). Dewsnup held that, despite the bifurcating effect of Section 506(a), Section 506(d) did not automatically operate to avoid a secured creditor's lien to the extent the lien was unsecured, but only to the extent that the claim itself was invalid. A Chapter 7 debtor therefore could not use Section 506(d) to strip down an otherwise valid lien. A necessary corollary to this is that bifurcation of a claim into secured and unsecured portions under Section 506(a) does not itself avoid the unsecured portion of the creditor's lien, or it would have been unnecessary to reach the Section 506(d) issue.

Although the Court reserved the

question of whether the words "allowed secured claim" might have a different meaning in other provisions of the Bankruptcy Code, 112 S.Ct. at 778 note 3, it made no similar reservation with respect to Section 506(d) as a whole. Section 506(d) is a provision of general application in the Code. Section 103(a). It must logically have the same meaning when applied in Chapter 13 as when applied in Chapter 7. Therefore, Section 506(d) cannot be used to avoid an otherwise valid lien in Chapter 13 any more than it can be so used in Chapter 7.

However, avoidance of the unsecured portion of the residential mortgagee's lien is a necessary element of the Chapter 13 stripdown from the debtor's prospective, or being discharged of the unsecured portion of the mortgage debt

would be of little benefit. The debt would still have to paid in order to remove the lien. Dewsnup, 112 S.Ct. at 778; In re Dyer, 142 B.R. 364, 372 (Bkrtcy. Ariz. 1992). Some lower courts, prior to Dewsnup, had explicitly held that the lien avoidance was pursuant to Section 506(d). E.g., In re Hougland, 93 B.R. 718 (D. Ore. 1988); In re Franklin, 126 B.R. 702, 712 (Bkrtcy. N.D. Miss. 1991).

The Court of Appeals decisions to permit stripdowns do not explicitly address the issue of how the mortgagee's lien is being avoided, but imply that lien avoidance occurs under Section 506(a). Wilson, 895 F.2d at 126 (reference to "the lien avoidance mechanism of Section 506(a)"); Hart, 923 F.2d at 1414-5 (references to bifurcation of the mortgage itself, rather than merely the claim). In

the Wiese decision, the Ninth Circuit relied on the Second Circuit's Bellamy decision in an attempt to distinguish Dewsnup on the grounds that it dealt only with the meaning of "secured claim" and was limited to the facts before it. 980 F.2d at 1282. According to the Ninth Circuit, Dewsnup's discussion of lien stripping had no impact on the bifurcation of claims in Chapter 13. Thus, the Ninth Circuit is clearly equating the simple bifurcation of the mortgagee's claim with the avoidance of the unsecured portion of the mortgage lien itself.

As noted above, no lien avoidance occurs under Section 506(a) or else Dewsnup would not have found it necessary to reach the issue of lien avoidance under Section 506(d). Accordingly, to the extent that those circuits that permit

Chapter 13 residential mortgage stripdowns do so in reliance on either Section 506(a) or Section 506(d), their decisions, including the decisions involved in this petition, are clearly in conflict with Dewsnup. The granting of certiorari is therefore also appropriate to correct these errors.

Because its decisions are vague on this issue, it is possible that the Ninth Circuit was relying on the § 1322(b)(2) power to modify unsecured claimants' rights to accomplish the lien avoidance. However, a power to "modify rights" does not on its face necessarily include a power to avoid liens. Congress usually provided for lien avoidance in explicit terms. See, e.g., Section 522(f); Section 1123(a)(5)(E). No other lien avoidance provision speaks solely in terms of a

power to modify a claimant's rights. Because of this, it cannot be said that the language of the statute is so plain that it is safe to conclude that a lien avoidance power was intended by Congress, without delving into the statute's legislative history. This, however, the Ninth Circuit refused to do. 980 F.2d at 1282.

Examination of the statute's legislative history is all the more necessary because a lien avoidance power with respect to the debtor's residence would be a major departure from pre-Code law. Dewsnup, 112 S.Ct. at 779.[6] Had the

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[6]Bellamy attempts to avoid this conclusion by noting that former Chapter XIII precluded debtors from "dealing with" the claims of creditors holding real property as security while the new Chapter 13 does permit this. 962 F.2d at 183-4. This incorrectly equates a power to "deal with" a class of secured claims with a power to avoid the lien securing those

Ninth Circuit examined the legislative history of §1322(b)(2) as urged by the petitioners in these cases, it would have discovered that there was no evidence that Congress intended to depart from pre-Code practice to the extent of permitting a Chapter 13 debtor to avoid any portion of a residential mortgagee's mortgage lien. The Ninth Circuit thus permitted a major departure from pre-Code practice that is unsupported by either the text of the statute or its legislative history. This is contrary to this court's ruling in Dewsnup, and therefore constitutes an additional reason for granting Certiorari.

Because of this departure from the applicable decisions of this court and

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claims. Prior law did permit debtors to "deal with" the claims of creditors secured by personal property, but did not permit the avoidance of those creditors' liens.

because of the split in authority among the circuits, petitioners in these cases respectfully request that this court grant their petition, and issue a Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

DATED this ___ day of _____, 1993.

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By: _____
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APPENDIX

Opinion, U.S. Court of Appeals
For the Ninth Circuit

Lomas Mortgage USA v. Wiese

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOMAS MORTGAGE U S A., *Creditor-Appellant,* v. DANIEL WIESE; SUE ANN WIESE, *Debtors-Appellees.*	No. 91-36082 D.C. No. CV-90-0504-JKS
LOMAS MORTGAGE U S A., *Creditor,* and FEDERAL NATIONAL MORTGAGE ASSOCIATION, *Creditor-Appellee,* v. DANIEL WIESE; SUE ANN WIESE, *Debtors-Appellants.*	No. 91-36173 D.C. No. CV-90-0504-JKS OPINION*

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
August 20, 1992—Anchorage, Alaska

Filed December 4, 1992

Before: Procter Hug, Jr., Dorothy W. Nelson, and Thomas G. Nelson, Circuit Judges.

*In Docket Nos. 91-35470, 91-35924, 91-35950, and 91-35963 unpublished dispositions will be filed at a subsequent date.

Opinion by Judge T.G. Nelson

SUMMARY

Bankruptcy/Claims/Mortgages/Personal Reorganization

Affirming a district court judgment upholding a decision of the Bankruptcy Court, the court of appeals held that while 11 U.S.C. § 1322(b) permits the modification of both the secured and unsecured portions of a residential mortgagee's claim, mortgage insurance may not be calculated into the value of the secured claim.

Appellants Daniel and Sue Ann Wiese obtained a mortgage loan for purchasing their residence secured by a deed of trust. The loan was covered by private mortgage insurance that protected the lender in case of default by the Wieses and a decline in the value of the collateral. After the note and deed of trust were assigned by the original lender to the Federal National Mortgage Association (FNMA), the Wieses filed for Chapter 13 bankruptcy protection. At the time of filing their petition, the Wieses' residence was worth less than the balance still outstanding on the debt due to a downturn in the real estate market and economy. Lomas Mortgage, a partially secured and unsecured creditor of the Weises, objected to the bankruptcy court's confirmation of the Wieses' Chapter 13 plan and appealed the order of confirmation to the district court. The district court affirmed the confirmation of the plan and reversed the bankruptcy court's reduction of the secured claim based upon transaction costs. Lomas argued that the previous Ninth Circuit decision in *Hougland v. Lomas & Nettleton Co.*, 886 F.2d 1182 (1989) should be overruled because the plain meaning of 11 U.S.C. § 1322(b) prohibits modification of both the secured and unsecured portions of a residential mortgagee's claim, that the interpretation of the statute in that case creates absurdities by eliminating the special protec-

tion for residential mortgagees. The Wieses cross-appealed, contending the transaction costs were valid.

[1] Initially, the Ninth Circuit reaffirmed its holding in *Hougland*. [2] The court acknowledged that under the Bankruptcy Code, an undersecured claim can be divided into a secured portion and an unsecured portion. [3] Although Lomas spent a great deal of energy discussing the legislative history behind § 1322(b), the court did not need to delve into that here because the statute could be interpreted on its face. The court adhered to its belief that the legislative history indicated a desire to assist home lenders and nothing more. [4] Also rejected was Lomas' contention that lenders would be subject to unfair treatment and face absurd results if *Hougland* was to stand. [5] A recent Supreme Court decision did not prohibit the bifurcation of secured claims from unsecured claims for purposes of Chapter 13. [6] The court disagreed that the value to FNMA of its collateral was not the market value of the property but consisted of that value plus what FNMA could receive under its mortgage insurance. [7] Instead, the court concluded that mortgage insurance should not be included in the valuation, because agreements between the creditor and third parties should not affect the valuation of the subject property for purposes of the creditor's secured claim.

[8] Because the court affirmed the denial of Lomas' motion for relief from the automatic stay under § 1327(a) of the Code, the court did not need to apply § 362(d) to this case. [9] The court noted that the Ninth Circuit Bankruptcy Appellate Panel has held that the language of § 1327(a) binds the creditor to the provisions of a confirmed plan whether or not the creditor has objected to, accepted or rejected the plan. The court noted that it has similarly held that once a Chapter 13 plan is confirmed, all of the property of the estate vested in the debtor and creditors are precluded from asserting any other interest than that provided for them in the confirmed plan. [10] Thus, because the issues involved in determining

whether relief from the automatic stay were determined in the confirmation of the plan, and are thus res judicata, the court held that the bankruptcy court did not abuse its discretion in denying relief from the automatic stay. Neither did the district court in affirming that decision.

[11] The court also affirmed the district court's denial of transaction costs. It would be inconsistent not to calculate mortgage insurance into the value of the creditor's claim but allow hypothetical transaction costs. Thus, the district court did not err in reversing the bankruptcy court's deduction of transaction costs from the value of the secured claim.

COUNSEL

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David Rankine, McNall & Rankine, Archorage, Alaska, for the debtors-appellees-debtors-appellants.

OPINION

T.G. NELSON, Circuit Judge:

Lomas Mortgage (Lomas), a partially secured and unsecured creditor of Chapter 13 debtors, Daniel and Sue Ann Wiese, held a security interest in the Wieses' residence. Lomas appeals the district court's partial affirmance of the bankruptcy court's order confirming the Wieses' Chapter 13 plan. The Wieses cross-appeal the district court's calculation of the amount of the secured claim in their residence.

I. BACKGROUND

The Wieses purchased their residential real property in September, 1985, with the aid of a mortgage loan which was

secured by a deed of trust against their residence. The loan was covered by private mortgage insurance which protected the lender in case of default by the Wieses and a decline in the value of the collateral. The note and deed of trust were assigned by the original lender to the Federal National Mortgage Association (FNMA).

The Wieses filed this Chapter 13 proceeding with the Bankruptcy Court on January 25, 1990. At the time of their petition, the residence was worth less than the $155,000 balance still outstanding on the debt, due to a downturn in the Alaskan real estate market and economy. The bankruptcy court confirmed the Wieses' Chapter 13 plan on November 2, 1990, in an order that provided:

> The debtor and Lomas Mortgage USA and Federal National Mortgage Association . . . have stipulated that the secured claim of Secured Creditor is $145,000.00, less $11,000.00 to repair a septic system and certain other "transaction costs" of $13,500.00, for [a] net figure of $120,500 . . . . This is secured by a deed of trust in favor of Secured Creditor against the real property that is the debtor's principal residence. Secured Creditor therefore has an allowed secured claim of [$120,500]. The balance [of] Secured Creditor's claim is disallowed as a secured claim but is allowed as a general unsecured claim . . . .

Lomas appealed the order of confirmation to the district court which affirmed the confirmation of the plan and reversed the bankruptcy court's reduction of the secured claim based upon transaction costs. As a result of the partial reversal, Lomas' secured claim was raised to the full $145,000. Lomas appealed and the Wieses cross-appealed contending the transaction costs were valid.

Lomas concedes that our decision in *Hougland v. Lomas & Nettleton Co. (In re Hougland)*, 886 F.2d 1182 (9th Cir. 1989), which permitted modification of unsecured portions of the debt, controls. It argues, however, that we should reverse our earlier ruling because the plain meaning of 11 U.S.C. § 1322(b) prohibits modification of both the secured and unsecured portions of a residential mortgagee's claim. Lomas claims that *Hougland* was based on faulty reasoning because it "ignored" the definition of the word "claim" provided by section 101(5)(A) as a "right to payment" whether it is secured or unsecured.[1] Second, Lomas urges us to overrule *Hougland* in light of the recent Supreme Court ruling in *Dewsnup v. Timm*, 112 S. Ct. 773 (1992). Finally, Lomas contends that *Hougland*'s interpretation of the statute creates absurdities by eliminating the special protection for residential mortgagees. We reject these contentions and affirm.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 158(d). We review *de novo* the interpretation of a statute by the district court and bankruptcy court. *In re Am. Mariner Indus., Inc.*, 734 F.2d 426, 429 (9th Cir. 1984).

III. DISCUSSION

A. *Bifurcation and Modification of Unsecured Claims*

[1] *Hougland* concerns the interplay between two bankruptcy statutes, 11 U.S.C. §§ 506(a) and 1322(b)(2). 886 F.2d at 1183. That case resolved two issues and held that: (1) a Chapter 13 debtor could bifurcate a claim secured only by the debtor's principal residence into a secured and unsecured por-

[1] 11 U.S.C. § 101(5)(A) defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

tion; and, (2) the lender's rights on the unsecured claim could be modified. *Id.* at 1185. We now reaffirm our holding in *Hougland.*

[2] Initially, *Hougland* noted that " '[s]ubsection (a) of § 506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured.' " *Id.* at 1183 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 239 (1989)). Second, the court observed that section 1322, dealing with debtors' plans in Chapter 13 proceedings, provides in part:

> (b) Subject to subsections (a) and (c) of this section, the plan may . . .
>
> (2) modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence,* or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims . . . .

Id. (emphasis in original). Finally, after acknowledging the split in authority, *Hougland* agreed with the line of cases which "found that nothing in section 1322 affects the determination under section 506(a) that an undersecured claim can be divided into a secured portion and an unsecured portion." *Id.*

In allowing the modification of the unsecured portion of a claim, *Hougland* reasoned that the meaning of the statute begins and ends with the language of the statute itself:

> It should first be noted that it is clear that section 506(a) applies to Chapter 13 proceedings. *See* § 103(a). There is, therefore, no reason to believe that the phrases "secured claim" and "unsecured claim" in section 1322(b) have any meaning other

> than those given to them by section 506(a). It follows that Lomas' claim had a "secured claim" and an "unsecured claim" component.
>
> That being said, we can look at the "other than" clause. That clause follows the secured claim portion of the sentence and precedes the unsecured claim portion. Certainly it refers to what preceded it, and indicates that a secured residential real estate claim will have special protection. Indeed, if the referent of the "other than" clause is not the secured claim language which precedes it, what could the referent be? It would be most unusual if it were the unsecured claim language or the whole sentence. That strongly indicates that only the "secured claim" portion is protected.

Hougland, 886 F.2d at 1183-84.

This interpretation has been uniformly followed by the only three other circuit courts which have had occasion to address the question. *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 962 F.2d 176, 180-81 (2d Cir. 1992) ("other than" clause must be limited to secured claim, citing *Hougland*); *Hart v. Eastland Mortgage Co. (In re Hart)*, 923 F.2d 1410, 1415 (10th Cir. 1991) ("[t]he position of the Third and Ninth Circuits and the other courts which have adopted threshold bifurcation under section 506(a) prior to submission of the secured claim portion of a mortgage to the protection of section 1322(b)(2) reflects the plain meaning of section 1322(b)(2) . . ."); *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 127 (3rd Cir. 1990) ("[w]e agree with the Ninth Circuit's view that because the 'other than' phrase is best read to refer to secured claims, the 'other than' phrase should be read to limit modification only of that portion of the claim that is secured"). *Hougland* was correctly decided and we find no reason to upset its holding. Moreover, even assuming that we disagreed with *Hougland*, "[w]e are bound by decisions of

prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions." *United States v. State of Washington*, 872 F.2d 874, 880 (9th Cir. 1989) (internal quotations omitted). Because *Hougland* has not been undermined, we cannot depart from its holding.

[3] Although Lomas spends a great deal of energy discussing the legislative history behind section 1322(b)(2), we need not delve into that here because the statute can be interpreted on its face. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). We still adhere to the brief comments made in *Hougland* that the legislative history indicates a desire to assist home lenders and nothing more. *See* 886 F.2d at 1185.

[4] We also reject Lomas' contention that lenders will be subject to unfair treatment and will face "absurd results" if *Hougland* is to stand. "[T]hese speculative contingencies regarding fluctuating real estate prices are not sufficient to justify a result contrary to that required by the Code's language." *Bellamy*, 962 F.2d at 186.

[5] The recent Supreme Court decision, *Dewsnup v. Timm*, 112 S. Ct. 773 (1992), does not affect our decision in *Hougland*. As the Second Circuit has observed, "*Dewsnup* did not hold that 'secured claim' in other provisions of the Code was never to be construed as it was in § 506(a). Its analysis was limited to 506(d) and the facts before it." *Bellamy*, 962 F.2d at 182 (citations omitted). *Dewsnup* "was concerned solely with lien avoidance which extends beyond a bankruptcy case, arising by effect of the 'lien avoidance' language of § 506(d)." *In re Taras*, 136 B.R. 941, 949 (Bankr. E.D. Pa. 1992). Nowhere does *Dewsnup* suggest that its discussion of 'lien stripping' has any impact on the bifurcation of secured claims from unsecured claims for the purposes of Chapter 13.

B. *Mortgage Insurance*

Lomas argues that if modification is to be permitted, then its secured claim must be valued according to what FNMA could receive on its mortgage insurance. The relevant portion of section 506(a) provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a).

The legislative history of this section is minimal. It states only that "[w]hile courts will have to determine value on a case-by-case basis, the subsection makes it clear that valuation is to be determined in light of the purpose of the valuation and the proposed disposition or use of the subject property." S. Rep. No. 989, 95th Cong., 2d Sess. 68 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854.

[6] Lomas argues that this means the value of the creditor's secured claim in bankruptcy is what the creditor could sell its interest in the collateral for outside of bankruptcy. FNMA's claim is based upon mortgage insurance which provides that if default causes foreclosure and a third party does not purchase the property, the property may be conveyed to the insurer by the lender after foreclosure in return for payment of the principal balance and some expenses. Lomas argues,

consequently, that the value to FNMA of its collateral is not the market value of the property but consists of that value plus what FNMA could receive under its mortgage insurance. We reject this argument.

[7] Instead, we conclude that mortgage insurance should not be included in the valuation. Our conclusion is based in part upon the last sentence in section 506(a) which states "[s]uch value shall be determined in light of the purpose of the valuation and of the *proposed disposition or use of such property* . . . ." 11 U.S.C. § 506(a) (emphasis added). We adopt the reasoning of *In re Fischer*, 136 B.R. 819 (D. Alaska 1992), which held "that the value of the property in question should not include the mortgage insurance" because "agreements between the creditor and third parties should not affect the valuation of the subject property." *Fischer*, 136 B.R. at 828 (following the analysis of *In re Lopez*, 75 B.R. 961 (Bankr. E.D. Pa. 1987), *aff'd*, 82 B.R. 712 (Bankr. E.D. Pa. 1988), holding that because plan did not relinquish property for foreclosure, proper valuation was fair market value without consideration of mortgage insurance).

Our holding today does not conflict with our recent decision *In re Mitchell*, 954 F.2d 557 (9th Cir.), *cert. denied*, 61 U.S.L.W. 3264 (1992), a case involving the valuation of the debtor's automobile. *Mitchell* concluded that the wholesale value rather than replacement cost should determine valuation. " '[W]hat is being valued is the creditor's "interest" in the collateral, not the debtor's interest.' " *Id.* at 560 (quoting Queenan, *Standards for Valuation of Security Interests in Chapter 11*, 92 Com.L.J. 19, 30 (1987)). As *Fischer* points out, however, *Mitchell* is consistent with our holding because it did not involve insurance or "any type of recourse agreement that would guarantee the creditor more than market value." *Fischer*, 136 B.R. at 827.

We find additional support for our holding in *Grubbs v. Nat'l Bank of South Carolina*, 114 B.R. 450 (D.S.C. 1990), a

case which involved automobile valuation but contained the additional factor of a recourse agreement. In *Grubbs*, the court noted that:

> "The availability to such holder of recourse against third parties with respect to the claim should not affect the value attributed to the property . . . . The bankruptcy court must protect the holder of a secured claim only to the extent of the value of his interest in the estate's interest in the subject property. The court is not required to afford protection with respect to the creditor's contractual rights against third parties."

Grubbs, 114 B.R. at 452 (quoting COLLIER ON BANKRUPTCY ¶ 506.04 [2], at 506-35 to 36) (ellipsis in original). Because we find no practical distinction between a recourse agreement and a mortgage guaranty in this context, we hold that mortgage insurance should not be calculated into the value of the secured claim.

C. *Automatic Stay*

Lomas and FNMA argue that the district court erred in affirming the bankruptcy court's denial of their motion for relief from the automatic stay. First, they contend that relief should have been granted because they were not adequately protected. The district court erred by focusing on the mortgage insurance, they argue, because the test does not look to the value of the creditor's secured claim but only whether its interest in the property is protected. They then argue that because FNMA's interest was in the deed of trust which was covered by the insurance, the insurance should have been taken into account. Second, they contend that the Wieses had no equity in the property and had the burden to demonstrate that the property was necessary for them to effectuate the plan.

Whether to grant relief from the automatic stay for cause under section 362(d)(1) or (d)(2) is discretionary and reviewed for an abuse of discretion. *In re MacDonald*, 755 F.2d 715, 716 (9th Cir. 1985).

Section 362(d) provides that relief from an automatic stay may be granted:

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if—
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d).

[8] Because we affirm the denial of Lomas' motion for relief from the automatic stay pursuant to section 1327(a), we need not apply section 362(d) to this case. Section 1327(a) states that:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. § 1327(a).

[9] The Ninth Circuit BAP has held that the language of section 1327(a) binds the creditor to the provisions of the plan

whether or not the creditor has objected to, accepted or rejected the plan. *Anaheim Sav. & Loan Ass'n v. Evans (In re Evans)*, 30 B.R. 530, 531 (Bankr. 9th Cir. 1983). "An order confirming a Chapter 13 plan is res judicata as to all justiciable issues which were or could have been decided at the confirmation hearing." *Id. Evans* further stated that "issues of adequate protection, lack of equity, and necessity for a successful rehabilitation of the Chapter 13 debtor [are] all res judicata as of the confirmation of the plan." *Id.* Similarly, we have held that "[o]nce a Chapter 13 plan is confirmed, all of the property of the estate vests in the debtor and creditors are precluded from asserting any other interest than that provided for them in the confirmed plan." *Fietz v. Great W. Sav. (In re Fietz)*, 852 F.2d 455, 458 (9th Cir. 1988) (citing 11 U.S.C. § 1327 (1982) and *In re Evans*, 30 B.R. at 531).

[10] Therefore, because the issues involved in determining whether relief from the automatic stay were determined in the confirmation of the plan, and thus are res judicata, we hold that the bankruptcy court did not abuse its discretion by denying relief from the automatic stay and the district court correctly affirmed that decision.

D. *Constitutional Issue*

Finally, Lomas argues that the unsecured portion of a mortgage lien constitutes a valuable property right that is protected by the Takings Clause of the Fifth Amendment. It argues that allowing modification of the unsecured portion of a creditor's claim constitutes lien avoidance and consequently violates the Takings Clause.

However, we need not reach the merits of this constitutional issue because Lomas failed to raise it both in the bankruptcy court and in the district court. Therefore, it has waived that issue and is precluded from asserting it before this court. *See United States v. Wanless*, 882 F.2d 1459, 1462 (9th Cir. 1989) (failure of Government to raise Fourth Amendment

standing issue either in the district court or on appeal results in waiver).

E. *Wieses' Cross-Appeal*

The Wieses' cross-appeal arguing that the district court erred by reversing the bankruptcy court and denying a deduction in the value of the secured claim for transaction costs and anticipated expenses for septic tank repairs. The district court held that because the property would be retained by the debtor it would be inappropriate to deduct transaction costs from the value. We agree.

As the Bankruptcy Appellate Panel stated in *Case*, "when the debtor plans to retain the property, selling costs should not be deducted from the fair market value of the property when valuing the creditor's interest in the property." *In re Case*, 115 B.R. 666, 670 (Bankr. 9th Cir. 1990).

Intuitively, this makes sense and, as Lomas points out, is really only the flipside of its effort to figure mortgage insurance into valuation. Both arguments are attempting to base valuation upon a contingency that never took place. Consequently, the discussion of each issue complements the other.

As with the mortgage insurance issue, this question involves the interpretation of section 506(a). The contention put forth by the Wieses highlights what at first appears to be a conflict within the statute itself. The first sentence provides that "[a]n allowed claim . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . ." 11 U.S.C. § 506(a). The second sentence provides that "[s]uch value shall be determined in the light of the purpose of the valuation and of the proposed disposition or use of such property . . . ." *Id.*

While this circuit has not addressed the question, the Fourth Circuit has discussed it under somewhat different facts in

Brown and Co. Sec. Corp. v. Balbus (In re Balbus), 933 F.2d 246 (4th Cir. 1991).[8] *Balbus* determined that the only way to read the statute without effectively erasing the second sentence was to deduct sales costs only if there were an actual sale. *Id.* at 252. Acknowledging that there is a split in authority among lower courts, the *Balbus* court concluded that "[c]ourts which have focused on the intended use of the property have generally held that when a debtor retains the property, hypothetical costs should not be deducted." 933 F.2d at 251.

Balbus noted that initially courts had dwelled upon the first sentence and allowed deduction of such costs,[9] but that " 'a growing number of courts have rejected this line of reasoning, and have refused to deduct the sale costs in rendering a § 506 calculation unless the debtor's plan contemplates selling the property on the open market.' " *Id.* at 249-50 (quoting *In re 222 Liberty Assoc.*, 105 B.R. 798, 803 (Bankr. E.D. Pa 1989)).

The reasoning of the courts that focused on the first sentence was that section 506(a) "mandates" that the creditor's interest in the property controls the valuation. *In re Ward*, 13 B.R. 710, 712 (Bankr. S.D. Ohio 1981). This view has been roundly criticized:

> Such an interpretation would mean that the value should always be fixed at the amount which the

[8]The facts in *Balbus* are different only because there the creditor was attempting to deduct the hypothetical costs of the sale when calculating the value of the debtor's real property in order to take the bankruptcy out of Chapter 13 and convert it to a Chapter 7 filing. If the deductions were taken into account, the amount of the secured debt would have been greater than allowed for Chapter 13 filings under 11 U.S.C. § 109(e). However, the legal issue, the statutory interpretation, is the same.

[9]See *In re Smith*, 92 B.R. 287 (Bankr. S.D. Ohio 1988); *In re Richardson*, 82 B.R. 872 (Bankr. S.D. Ohio 1987); *In re Claeys*, 81 B.R. 985 (Bankr. D.N.D. 1987); *In re Parr*, 30 B.R. 276 (Bankr. N.D. Ala. 1983).

> creditor would receive upon foreclosure regardless of the purpose of the valuation and of the proposed disposition or use of the property.

In re Courtright, 57 B.R. 495, 497 (Bankr. D.Or. 1986). *Balbus* agreed with this interpretation. 933 F.2d at 250-52.

Balbus adopted this second view also because of its reading of dicta found in *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988). *Balbus*, 933 F.2d at 252. There, the Supreme Court stated:

> In subsection (a) of [§ 506] the creditor's "interest in property" obviously means his security interest without taking account of his right to immediate possession of the collateral on default.... *The phrase "value of such creditor's interest" in § 506(a) means "the value of the collateral."*

Timbers, 484 U.S. at 372 (emphasis added). The *Balbus* court concluded that "the better view is that the secured creditor's interest may be valued for § 506(a) purposes without superimposing a foreclosure or other sale of the collateral where a disposition of the property is not reasonably in the offing." 933 F.2d at 251 (internal quotations omitted).

[11] We adopt the view of the Fourth Circuit in *Balbus* and affirm the district court's denial of transaction costs. First, as the *Balbus* court stated, to do otherwise would be to completely erase the second sentence of the statute. Second, it is contradictory to allow the debtor to keep the home but value the secured portion based upon a hypothetical sale of the residence. As one court put it, "the debtors cannot eat with the hounds and run with the hares." *Matter of Crockett*, 3 B.R. 365, 367 (Bankr. N.D. Ill. 1980). Third, this is consistent with the legislative history of section 506(a) which reflects Congress's intent that the issues would be resolved on a "case-by-case" basis. Finally, it would be inconsistent not to calculate

mortgage insurance into the value but to allow hypothetical transaction costs.

CONCLUSION

The district court properly affirmed the bankruptcy court's order bifurcating Lomas' claim into secured and unsecured portions and allowing the debtors to modify the unsecured portion. We decline to reexamine *Hougland*. In addition, as the district court concluded, the bankruptcy court properly excluded the mortgage insurance from the valuation of the secured claim. We further conclude that the district court did not err in reversing the bankruptcy court's deduction of transaction costs from the value of the secured claim.

AFFIRMED.

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Opinion, U.S. Court of Appeals
For the Ninth Circuit

Goldome Realty Credit Corp v. Saugstad

FILED
DEC 10 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GOLDOME REALTY CREDIT CORP.,	)	No. 91-35924
Creditor-Appellant,	)	
v.	)	D.C. No. CV-90-330-AJK
MARK CHRISTIAN SAUGSTAD, f/dba/Construction and Equipment; KATHLEEN CELESTE SAUGSTAD,	)	MEMORANDUM[1]
Debtors-Appellees.	)	

Appeal from United States District Court
for the District of Alaska
Andrew J. Kleinfeld, District Judge,
Presiding

Argued and Submitted August 20, 1992
Anchorage, Alaska

Submission deferred: September 1, 1992
Resubmitted: December 8, 1992

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: HUG, D.W. NELSON, and T.G. NELSON, Circuit Judges.

On January 14, 1986, the Saugstads purchased their home with the aid of a mortgage loan that was secured by a deed of trust against the residence. The promissory note and deed of trust were subsequently assigned to Goldome Realty Credit Corporation (Goldome). The Saugstads filed their Chapter 13 bankruptcy petition on November 27, 1989. Because of a downturn in the Alaskan economy at the time the petition was filed, the fair market value of the residence had fallen to $81,090, well below the $125,000 outstanding on the mortgage.

Over Goldome's objection, the bankruptcy court confirmed the Saugstad's Chapter 13 plan on July 13, 1990. The court valued the residence at its fair market value of $81,090. The remainder of

the debt was characterized as unsecured debt, modifiable under 11 U.S.C. § 1322(b)(2). Goldome objected in part because of the bifurcation of the claim into secured and unsecured portions. Goldome concedes that our decision in Hougland v. Lomas & Nettleton Co. (In re Hougland), 886 F.2d 1182 (9th Cir. 1989), which permitted modification of unsecured portions of such debt, controls. It argues, however, that we should reverse our earlier ruling. Goldome also argues that even if we affirm Hougland, the secured claim was undervalued because the mortgage insurance was not taken into account. We reject both arguments and now affirm.

I

We recently reaffirmed our Hougland decision in Lomas Mortgage U S A v. Wiese, Nos. 91-36082 and 91-36173, slip op. 14069 (9th Cir. Dec. 4, 1992). In Hougland,

this court held that section 1322(b)(2) of the Bankruptcy Code permitted a Chapter 13 debtor to modify a residential mortgagee's rights in the unsecured portion of its claim, as defined by section 506(a). Hougland, 886 F.2d at 1183-84. As we stated in Wiese, Hougland was correctly decided and we found no reason to upset its holding. Wiese, slip op. at 14076. Therefore, Goldome's claims are without merit.

Although Goldome spends a great deal of energy discussing the legislative history behind section 1322(b)(2), we need not delve into that here because the statute can be interpreted on its face. Id. at 14077. We also reject Goldome's contention that lenders will be subject to unfair treatment and will face "absurd results" if Hougland is to stand. Id.

II

Goldome argues further that if

modification is to be permitted, then its secured claim must be valued according to what it could receive on its mortgage insurance. It argues that the value of the creditor's secured claim in bankruptcy is what the creditor could sell its interest in the collateral for outside of bankruptcy. Goldome's claim is based upon mortgage insurance which provides that if default causes foreclosure and a third party does not purchase the property, the property may be conveyed to the insurer by the lender after foreclosure in return for payment of the principal balance and some expenses. It argues, consequently, that the value of the collateral to Goldome is not the market value of the property but that value plus what Goldome could receive under its mortgage insurance. We reject this argument.

In Wiese we held that mortgage insurance should not be calculated into

the value of the secured claim, reasoning that mortgage insurance should not be included in the valuation based in part on the last sentence in section 506(a). Id. at 14079. We reach the same conclusion here. Therefore, the district court did not err in refusing to include the mortgage insurance in valuing the secured claim.

III

Goldome also contends that lien avoidance violates the Takings Clause of the Fifth Amendment. However, as we stated in Wiese, because Goldome failed to raise this issue both in the bankruptcy court and in the district court, it has waived that issue. Id. at 14082-83.

AFFIRMED.

Opinion, U.S. Court of Appeals
For the Ninth Circuit

GMAC Mortgage Corporation v. Cervantes

FILED
DEC 10 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENERAL MOTORS ACCEPTANCE CORPORATION,	) No. 91-35950
Plaintiff-Appellant,	) D.C. No. CV-90-00137-JKS
v.	)
NOEL G. CERVANTES; ARNEL J. CERVANTES,	) MEMORANDUM[1]
Defendants-Appellees.	)

Appeal from United States District Court
for the District of Alaska
James K. Singleton, District Judge,
Presiding

Argued and Submitted August 20, 1992
Anchorage, Alaska

Submission deferred: September 1, 1992
Resubmitted: December 8, 1992

Before: HUG, D.W. NELSON, and T.G.

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

NELSON, Circuit Judges.

Noel and Arnel Cervantes purchased a condominium on May 22, 1985. The purchase was financed by a mortgage loan and was subsequently assigned by the originating lender to the Alaska Housing Finance Corporation (AHFC) and by it to the Federal National Mortgage Association (FNMA). GMAC Mortgage Corporation (GMAC) acts as servicing agent on the mortgage. Because of a downturn in the Alaskan economy, the fair market value of the condominium fell to $33,000, far less than the $76,000 still outstanding on the debt.

The debtors filed their Chapter 13 petition on September 6, 1989. Their Chapter 13 plan valued the condominium at the undisputed fair market value of $33,000. The remainder of the debt, $43,000, was characterized as unsecured debt, modifiable under 11 U.S.C. § 1322(b)(2). GMAC objected to confirmation

of the plan in part because it contested the transformation of the latter portion of its claim as unsecured. The bankruptcy court confirmed the debtors' plan and the district court affirmed the modification of GMAC's rights in the unsecured portion of the claim. GMAC concedes that our decision in Hougland v. Lomas & Nettleton Co. (In re Hougland), 886 F.2d 1182 (9th Cir. 1989), controls. It argues, however, that this court should reverse our previous ruling. We decline to do so and now affirm.

I

We recently reaffirmed our Hougland decision in Lomas Mortgage U S A v. Wiese, Nos. 91-36082 91-36173, slip op. 14069 (9th Cir. Dec. 4, 1992). In Hougland, this court held that section 1322(b)(2) of the Bankruptcy Code permitted a Chapter 13 debtor to modify a residential mortgagee's rights in the unsecured portion of its

claim, as defined by section 506(a). Hougland, 886 F.2d at 1183-84. As we stated in Wiese, Hougland was correctly decided and we found no reason to upset its holding. Wiese, slip op. at 14076. Therefore, GMAC's claims are without merit.

Although GMAC spends a great deal of energy discussing the legislative history behind section 1322(b)(2), we need not delve into that here because the statute can be interpreted on its face. Id. at 14077. We also reject GMAC's contention that lenders will be subject to unfair treatment and will face "absurd results" if Hougland is to stand. Id.

II

GMAC also contends that lien avoidance violates the Takings Clause of the Fifth Amendment. However, as we stated in Wiese, because GMAC failed to raise this issue both in the bankruptcy

court and in the district court, it has waived that issue. Id. at 14082-83.

AFFIRMED.

U.S. District Court Opinion

GMAC Mortgage Corporation v. Cervantes

FILED
JUL 03 1991
UNITES STATES DISTRICT COURT
DISTRICT OF ALASKA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

GMAC MORTGAGE CORPORATION,	)
	)
Creditor-Appellant,	)
	)
vs.	)
	)
NOEL G. CERVANTES, and ARNEL J. CERVANTES,	)
	)
Debtors-Appellees.	)
	)

Case No. A90-137 Civil
Bankruptcy No. A89-00965

O R D E R

This is an appeal from an order confirming a Chapter 13 plan. Originally there were two issues on appeal. First, whether 11 U.S.C. § 1322(b)(2) permits modification of the rights of GMAC Mortgage Corporation ("GMAC") in the unsecured portion of its claim against Noel G. Cervantes and Arnel J. Cervantes

("Cervantes"). Second, whether the plan should have a provision that would terminate the modification of GMAC's rights in the event the Cervantes were to default on their plan and GMAC becomes entitled to foreclose on the deed of trust.

The parties have stipulated that a provision terminating the modification of GMAC's rights should be included in the Chapter 13 Plan and that this case should be remanded for entry of such an order. Therefore, the only remaining issue is whether 11 U.S.C. § 1322(b)(2) permits modification of GMAC's rights in the unsecured portion of its claim.

The Ninth Circuit in In re Hougland, 886 F.2d 1182 (9th Cir. 1989) held that in a Chapter 13 bankruptcy proceeding an undersecured claim may be divided into secured and unsecured claims and that the unsecured claim may be modified. GMAC

asserts that Hougland was incorrectly decided. This court is not in a position to decide the correctness of Hougland. A district court in the Ninth Circuit is bound by the decision of the Ninth Circuit Court of Appeals.

IT IS THEREFORE ORDERED:

The bankruptcy courts decision is AFFIRMED IN PART and REMANDED for entry of an order providing for the termination of the modification of GMAC's rights in the event the Cervantes should default on their Chapter 13 plan.

DATED at Anchorage, Alaska this 2 day of July 1991.

s/s JAMES K. SINGLETON, JR.
United States District Court Judge

cc: Bankruptcy Clerk
R. Ullstrom (ROUTH)
C. Johansen

U.S. District Court Opinion

Goldome Realty Credit Corp v. Saugstad

FILED
JUL 03 1991
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

Goldome Realty Credit Corp.,	)	
Creditor-Appellant,	)	
v.	)	
Mark Christian Saugstad, f/d/b/a Construction and Equipment, and Kathleen Saugstad,	)	Case No. A90-330 Civ.
Debtor-Appellees	)	Bkcy. No. A89-01181

JUDGMENT

This is an appeal from an order confirming a Chapter 13 plan. The parties stipulated that the fair market value of the residence which was collateral for the secured creditor was $87,000.00. The bankruptcy judge reduced this for transaction costs if the property was sold, to $81,090,00.

First the creditor argues that 7% transaction costs should not be subtracted. The parties agree that the real estate will not be sold. Under 11 U.S.C. §506(a), the value must be determined "in light . . . of the proposed disposition or use of such property." Because the proposed disposition will not involve any 7% transaction costs, as sale of the property would, these costs should not have been subtracted. In re Case v. United States, 155 B.R. 666 (9th Cir. B.A.P. 1990).

Second, the creditor argues that mortgage insurance should have been included as part of the mortgagee's secured claim. The bankruptcy judge correctly determined that it should not. This is distinguishable from In re Malody, 102 B.R. 745 (9th Cir. B.A.P. 1989), involving whether a car should be valued at wholesale or retail. The measure under

§506(a) of the allowed claim is "the extent of the value of such creditors interest in the estate's interest in such property." The bankrupt estate has an interest in the real property, and that is the basis for the measurement. The bankrupt's estate has no interest in the mortgage insurance, so the creditor's interest in the estate's interest in the mortgage insurance is zero. The creditor has an interest in the mortgage insurance as a promisee, but that is not an interest in "the estate's interest in such property."

The appellant's third argument is that In re Houghland, 886 F.2d 1182 (9th Cir. 1989) is mistaken and should not be followed. A district court must follow a Circuit Court of Appeals decision.

The bankruptcy judge's order is reversed and remanded with regard to the 7% transaction costs, and is in all other

respects affirmed. This decision and judgment shall serve as the mandate.

Dated at Anchorage, Alaska, this 1 day of July, 1991.

s/s Andrew J. Kleinfeld, Judge

cc: R. Ullstrom (ROUTH)
E. LeRoy
Bkcy Court
O&J #4132

U.S. District Court Opinion

Lomas Mortgage USA v. Wiese

FILED
AUG 27 1991
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

LOMAS MORTGAGE USA,	)	
	)	
Creditor-Appellant,	)	U.S.D.C. No.
	)	A90-504 CIV
vs.	)	
	)	Bankruptcy No.
DANIEL G. WIESE and	)	A90-00066
SUE ANN WIESE,	)	
	)	
Debtor-Appellee.	)	
	)	

C O R R E C T E D

O R D E R

This is an appeal from an order confirming a Chapter 13 plan. Lomas Mortgage USA ("Lomas") objected to the confirmation or the plan arguing it was not adequately protected, mortgage insurance should be included in the value of the property in question, transaction costs should not be deducted from the

value and that In re Hougland, 886 F.2d 1182 (9th Cir. 1989) was incorrect and therefore it was incorrect for the bankruptcy court to modify Lomas's rights.

The parties stipulated that the fair market value of the property was $145,000. The bankruptcy court deducted transaction costs thereby allowing a secured claim for $120,500. The property is not going to be sold but retained by the debtor.

The Bankruptcy judge was correct in not allowing mortgage insurance to be included as part of Lomas's secured claim. The value of an allowed claim is the value of the creditors interest in the estates interest in the property. 11 U.S.C. § 506(a). The debtor's estate has no interest in the mortgage insurance. The proper value of the property does not include third party agreements. First Guaranty Mortgage v. Huber (In re Huber), No. A90-277 Civ. (D. Alaska May 7, 1991).

Whether to lift an automatic stay is within the sound discretion of the bankruptcy judge. Lomas contends that it was not adequately protected because the mortgage insurance was not included it the value. This court has already determined that it was correct not to include mortgage insurance. Lomas also contends that the debtors had no equity in the property and that it was not needed for an effective reorganization pursuant to 11 U.S.C. § 362(d)(2). It would defeat the purpose of Chapter 13, to let the debtor retain property, if § 362(d)(2) was found to be applicable in Chapter 13 cases. Chapter 13 is not a reorganization and therefore does not seek the same results as Chapter 11. The bankruptcy court was correct in denying the lift of the automatic stay.

The value of the property must be determined by taking into consideration

the proposed purpose of the property in question. 11 U.S.C. § 506(a). In this case because the property will be retained by the debtor it is inappropriate to deduct transaction costs from the value. In re Case, 115 B.R. 666 (9th Cir. BAP 1990); In re Huber, No. A90-277 Civ.

Finally, a district court in the Ninth Circuit may not make a determination that a decision by the court of appeals is incorrect. A district court must follow a Ninth Circuit opinion. Therefore, the bankruptcy court was correct in following In re Hougland and allowing the modification of Lomas's claim into secured and unsecured components.

IT IS THEREFORE ORDERED:

The bankruptcy court's order is reversed and remanded with regard to the transaction costs and is affirmed as to all other issues. The oral argument scheduled for September 6, 1991, is deemed

unnecessary pursuant to Local Rule 5(C)(1) and therefore is vacated.

s/s JAMES K. SINGLETON, JR.
United States District Court Judge

Redistributed 8/28/91 cc: R. Ullstrom
(ROUTH)
S. McKee

U.S. Bankruptcy Court Opinion

GMAC Mortgage Corporation v. Cervantes

FILED
MAR 15 1990
CLERK
U.S. BANKRUPTCY COURT
By: Deputy Clerk

UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF ALASKA

_____x

In re

NOEL G. CERVANTES and
ARNEL J. CERVANTES,
ssn: 224-17-5552
ssn: 574-32-8512

Case No.
A-89-00965
Chapter 13,

Debtor(s).

_____x ORDER CONFIRMING
CHAPTER 13 PLAN

The debtors' plan was filed on November 3, 1989, and was transmitted to the creditors pursuant to Bankruptcy Rule 3015. The plan was modified at the confirmation hearing on February 28, 1990, to enhance payments to the trustee and did not require additional notice of these changes. The court finds the plan as modified meets the requirements of 11 U.S.C. § 1325.

IT IS ORDERED that the debtors'

chapter 13 plan is confirmed, with the following provisions:

1. Payments in the amount of $30.00 per month for 8 of the winter, fall and spring months per year, and $1,180.00 per month for 4 of the months each year which fall around the summer, for a total of 36 months (i.e. a total of $4,960.00 per year, or $14,880.00 over the life of the plan). Payments shall be made on the 15th day of the month to the standing trustee: Beatrice Furman, 2525 Blueberry Road, Suite 103, Anchorage, AK 99503, whose fee will be 10%.

2. Attorneys fees shall be applied for before allowance.

3. (a)- Subject to ¶3(d) of this order, GMAC Mortgage Corporation of PA (GMAC) and the debtor have agreed that the current fair market value of debtors residence is $33,000.00. This is secured by a deed of trust in favor of GMAC on the

real property that is the debtors' principal residence. GMAC Corporation therefore has an allowed secured claim of at least $33,000.00. The balance GMAC's claim under its Proof of Claim No. 3 for $76,535.94, filed November 16, 1989, is disallowed as a secured claim but is allowed as a general unsecured claim.

(b)- Subject to ¶3(d) of this order, the original promissory note secured by the deed of trust described in the Proof of Claim is not superceded by this confirmation order, and remains in effect. The payment terms of the promissory note (or any modification agreed to by the parties) shall remain the same except that the balance due on the promissory note is deemed to be the amount of the allowed secured claim of GMAC. All other terms of the promissory note and deed of trust shall remain in effect, and the promissory note shall be treated

current as of February 28, 1990 with a balance due as of that date of $33,000.00. Interest shall accrue as of February 28, 1990, at the interest rate as stated in the promissory note or as otherwise agreed to by the debtors and GMAC (and, the parties have indicated that the rate is 10%). Payments shall be in the same amount as scheduled in the promissory note or as otherwise modified by the parties, with the next one due for the March, 1990 installment at the installment amount shown in the promissory note.

(c)- The debtors have no obligation to cure the arrearage on their pre-petition obligation to GMAC.

(d)- GMAC has argued that because, the debtors' deed of trust was covered by mortgage insurance, there may be a legal theory under which GMAC's secured claim would be a higher figure for confirmation purposes than the $33,000.00

fair market value. The parties have agreed to brief this issue promptly, and if the court increases the amount of the secured claim described in ¶ 3(a) of this order, the unsecured claim will decrease correspondingly. Since the debtors are making the scheduled payments already, an increase in the amount of the secured claim of $33,000.00 would only mean a longer amortization period to payoff the secured claim. The parties agreed, therefore, that the determination described in this ¶ 3(d) should not delay confirmation.

4. (a)- Since the debtors are proposing to discharge a substantial unsecured claim for a nominal payment, and the debtors' future income picture may be enhanced by Mr. Cervantes graduation in 1991 with a mechanical engineering degree from the University of Alaska at Fairbanks, the court imposes by this order

(and debtors have acquiesced in order to get her plan approved) a condition to both confirmation and discharge that debtors report their quarterly gross income (including gifts or inheritances exceeding $1,000.00), to the trustee and to the GMAC Mortgage Corp., of PA, c/o Richard Ullstrom, Esq., Routh, Crabtree & Harbour, 3510 Spenard Road, Anchorage, AK 99503. The reports should also be filed with the court.

(b)- The reports shall be signed by the debtor and be declared under penalty of perjury.

(c)- The first quarterly period to be reported is the second 3 months of 1990 (from April 1, 1990 to June 30, 1990). This first report for the second quarter of 1990 shall be due by July 30, 1990 (30 days after the end of the second quarter of 1990). The following quarterly reports shall be due for each subsequent

October 30th for the third quarter of the year, January 30th for the fourth quarter of the year, April 30th for the first quarter of the year, and so on, during the life of the plan.

(d)- The purpose of the reporting requirement is to allow the trustee, the GMAC, any other allowed unsecured claimant, to move for a modification of the plan under 11 U.S.C. § 1329 if it notes a substantial increase in debtors' ability to pay her creditors and such an amendment is allowable and appropriate.

(e)- If the debtors pay out under the terms of the present plan, but fail to substantially comply with the reporting requirement, the court reverses the right to consider this a default under the plan and deny a discharge under 11 U.S.C. § 1328(a), i.e. a "super discharge."

DATED: February 28, 1990

s/s HERBERT A. ROSS
Bankruptcy Judge

Serve:
-Debtors' Attorney: Chris Johansen, Esq.
-Richard Ullstrom, Esq., for GMAC
-Trustee: Beatrice Furman
-Chief Deputy Clerk
-U.S. Trustee
3/15/90 H2833

U.S. Bankruptcy Court Opinion

Goldome Realty Credit Corp v. Saugstad

FILED
JUL 13 1990
CLERK
U.S. BANKRUPTCY COURT
By: Deputy Clerk

UNITES STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA
605 West 4th Avenue, Room 138
Anchorage, AK 99501-2296

_____x

In re

MARK CHRISTIAN SAUGSTAD
fdba Construction and
Equipment, and KATHLEEN
CELESTE SAUGSTAD,
ssn: 574-20-3083
ssn: 574-30-6005

Case No.
A89-01181
Chapter 13

Debtor(s).

_____x

ORDER CONFIRMING CHAPTER 13 PLAN

The debtors' plan was filed on July 5, 1990 (the Third Amended Chapter 13 Plan found at Docket No. 38), and previous versions, less favorable to creditors, were transmitted to the creditors pursuant to Bankruptcy Rule 3015. Certain modifications were made at the confirmation hearing on July 10, 1990 which increased payments under the plan.

The court finds that failure to serve the final amended plan (Docket No. 38) did not prejudice any party because the creditors are more favorably treated in the final version. The court finds the plan meets the requirements of 11 U.S.C. § 1325.

IT IS ORDERED that the debtors' chapter 13 plan is confirmed, with the following provisions:

1. Payments in the amount of $571.00, due to the 15th day of each month, for 36 months, except that the payment will only be $200.00 per month until the payment due for February, 1991. Debtors will pay their Alaska Permanent Fund Dividend checks (2 checks per year) to the trustee for plan payments for 3 years (1990 - 1992). If the debtors have been paying real property taxes on their residence through a reserve, another $39.00 per month will be added for 36 months. Payments shall be made to the standing

trustee: Beatrice Furman, 2525 Blueberry Road, Suite 103, Anchorage, AK 99503.

2. Attorneys fees shall be applied for before allowance. This includes both pre-petition and post-petition fees claimed by Barry Jackson. Erik LeRoy's fees are allowed without application to the extent they do not exceed $1,000.00. Likewise, Mr. LeRoy's costs are allowed to the extent they do not exceed $100.00. Mr. LeRoy should advise the trustee of the exact amount of his fees and costs if they are within these limits, and the trustee may adopt the figures given her. Any portion over $1,000.00 should be applied for by Erik LeRoy according to the rules.

3. (a)- The debtors and Goldome Realty Credit Corporation (referred to in this ¶ 3 as "Secured Creditor") have stipulated that the secured claim of Secured Creditor is $81,090.00 (referred to in this ¶ 3 as the "Secured Amount") as

of the date of this order. This is secured by a deed of trust in favor of Secured Creditor's predecessor against the real property that is the debtors' principal residence. Secured Creditor therefore has an allowed secured claim of Secured Amount. The balance Secured Creditor's claim is disallowed as a secured claim but is allowed as a general unsecured claim provided that Secured Creditor has a timely filed proof of claim.

(b)- The original promissory note secured by the deed of trust now held by Secured Creditor is not invalidated by this confirmation order, and the payment terms shall remain the same except that the balance due on the promissory note is deemed to the amount of the allowed secured claim of Secured Creditor. All other terms of the promissory note and deed of trust shall remain in effect, and

the promissory note shall be treated current as of the day before the date of this order with a balance due as of that date of Secured Amount. Interest shall accrue at the rate stated in the promissory note secured by the deed of trust on the residence. Payments shall be in the monthly installment amount stated in the promissory note, with the next payment due on the date of the next regularly scheduled payment due after the date of this order. Secured Creditor shall be entitled to collect a monthly reserve to be impounded for such things as taxes and insurance as called for in the deed of trust.

(c)- The payments under this ¶ 3(b) shall be made directly by debtors to Secured Creditors and the trustee need not monitor the payments. The debtors shall be entitled to a discharge without regard to payment of the Secured Creditor secured

claim unless, before discharge is granted, Secured Creditor brings to the court's attention noncompliance with the direct payment provision under this order.

(d)- The debtors has no obligation to cure the arrearage on their pre-petition obligation to Secured Creditor.

(e)- Secured Creditor has only agreed to the value as a matter of accommodation, but has reserved the right to appeal the court's methodology of evaluating claim (e.g., not counting mortgage insurance) and the court's deduction of transaction costs (7% in this case).

4. The debtors have listed the unsecured creditors in the plan by name. This does not preclude unsecured creditors not so listed from having allowed unsecured claims. Claims of unsecured creditors must be filed to be allowed.

The plan contains various assumptions and illustrations which are normally contained in the budget and not the plan. The court is not, by this order, validating or "confirming" these illustrations and assumptions.

5. The court grants the parties 30 days from the date of entry of this order to appeal or seek reconsideration.

DATED: July 10, 1990

s/s HERBERT A. ROSS
Bankruptcy Judge

Serve:
-Debtors' Attorney: Erik LeRoy, Esq.
-Debtors' Former Attorney, Barry Jackson, Esq.
-Goldome's Attorney: Richard Ullstrom, Esq.
-Trustee: Beatrice Furman
-Chief Deputy Clerk
-U.S. Trustee

7/13/90 H3027

U.S. Bankruptcy Court Opinion

Lomas Mortgage USA v. Wiese

HERBERT A. ROSS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA
605 West 4th Avenue, Room 138
Anchorage, AK 99501-2296

FILED
NOV 02 1990
CLERK
U.S. BANKRUPTCY COURT
BY: Deputy Clerk

_____X

In re

DANIEL G. WIESE and
SUE ANN WIESE,
SSN: 517-44-0389 (husband)
SSN: 516-58-6436 (wife)

Case No.
A90-00066-HAR
Chapter 13

Debtor(s)

ORDER CONFIRMING CHAPTER 13 PLAN

_____X

The debtor's amended plan was filed on April 13, 1990, and was transmitted to the creditors pursuant to Bankruptcy Rule 3015. The court finds the plan meets the requirements of 11 U.S.C. § 1325. Certain modifications were made in open court that did not require noticing. Certain modifications were made in open court and did not require notice.

IT IS ORDERED that the debtor's chapter 13 plan is confirmed, with the following provisions.

1. (a)- Payments in the amount of $698.11, due on the 15th day of each month, for 25 remaining months, plus the previously paid lesser installments (4 months at $350/mo.; 1 month at $461.34/mo.; 3 months at $387/mo.). In addition, $1,200 per year from the Alaska Permanent Fund Dividend shall be paid to the trustee for 1990, 1991, and 1992 (even if beyond 36 months). The plan contains certain adjustments (up or down) concerning the septic system, and debtors will provide the trustee with information so she can calculate any adjustment. Payments shall be made to the standing trustee: Beatrice Furman, 2525 Blueberry Road, Suite 103, Anchorage, AK 99503.

(b)- The plan dedicates the proceeds of a wrongful discharge dispute

with the Municipality of Anchorage which is arbitration or litigation. The net proceeds (as defined in the plan as less costs and a percentage for debtors) shall be paid to the trustee if recover is made within 60 months of the first plan payment. Debtors will use there best efforts to recover a satisfactory judgment or award. So, the trustee will be getting cash under ¶ 1 (a) of this order for 36 months (or more for the recover of the last permanent fund amount of $1,200) and have an additional 24 months to receive the net proceeds from the wrongful discharge proceeding or suit against the Municipality of Anchorage. Debtors will keep the trustee informed and respond to her reasonable inquiries about the progress of the dispute.

2. Attorneys fees shall be applied for before allowance.

3. (a)- The debtor and Lomas

Mortgage USA and Federal National Mortgage Association (collectively referred to in this ¶ 3 as "Secured Creditor") have stipulated that the secured claim of Secured Creditor is $145,000.00, less $11,000.00 to repair a septic system and certain other "transaction costs" of $13,500.00, for net figure of $120,500.00 (the net figure is referred to in this ¶ 3 as the "Secured Amount") as of the date of this order. This is secured by a deed of trust in favor of Secured Creditor against the real property that is the debtor's principal residence. Secured Creditor therefore has an allowed secured claim of Secured Amount. The balance Secured Creditor's claim is disallowed as a secured claim but is allowed as a general unsecured claim provided that Secured Creditor has a timely filed proof of claim.

(b)- The original promissory note

secured by the deed of trust now held by Secured Creditor is not invalidated by this confirmation order, and the payment terms shall remain the same except that the balance due on the promissory note is deemed to the amount of the allowed secured claim of Secured Creditor. All other terms of the promissory note and deed of trust shall remain in effect, and the promissory note shall be treated current as of the day before the date of this order with a balance due as of that date of Secured Amount. Interest shall accrue at the rate stated in the promissory note secured by the deed of trust on the residence. Payments shall be in the monthly installment amount stated in the promissory note, with the next payment due on the date of the next regularly scheduled payment due after the date of this order. Secured Creditor shall be entitled to collect a monthly

reserve to be impounded for such things as taxes and insurance as called for in the deed of trust.

(c)- The payments under ¶ 3(b) shall be made directly by debtor to Secured Creditor and the trustee need not monitor the payments. The debtor shall be entitled to a discharge without regard to payment of the Secured Creditor secured claim unless, before discharge is granted, Secured Creditor brings to the court's attention noncompliance with the direct payment provision under this order.

(d)- the debtor has no obligation to cure any pre-petition arrearage on the indebtedness secured by the residence of debtor described in ¶¶ 3(a) and 3(b).

(e)- If this case is converted to chapter 7 before debtors' discharge under chapter 13, the Secured Creditor's lien avoided under 11 U.S.C. §506(a) shall be reinstated.

(f)- By accommodating the court and debtors in agreeing to the value of the residence and transaction costs, Secured Creditor does not waive the right to appeal the propriety of the court's rulings regarding "stripdown" and deduction of transaction costs.

4. Debtors and the Municipality of Anchorage have a dispute regarding whether post-petition attorney fees can be discharged as a general unsecured claim for the wrongful discharge suit, if the Municipality is award such fees. They have submitted the matter for this court to rule upon, but agree the ruling, one way or the other, shall not be grounds for contesting the correctness of the confirmation order.

5. The court extends the time to appeal from, or ask for reconsideration of, this order to 30 days from its entry.

DATED: October 31, 1990

s/s HERBERT A. ROSS
Bankruptcy Judge

Serve:
-Debtor's Attorney: Stephen F. McKee, Esq.
-Lomas/FNMA Attorney: Richard Ullstom, Esq.
-Municipality's Attorney: Peter Hallgrimson, Esq.
-Trustee: Beatrice Furman
-Chief Deputy Clerk
-U.S. Trustee

H3232 (HAR/lp)

11/2/90

92-1630

(3)

No. 93-_____

Supreme Court, U.S.
FILED
APR 28 1993
OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1992

LOMAS MORTGAGE USA,
GMAC MORTGAGE CORPORATION,
GOLDOME REALTY CREDIT CORP,

Petitioners,

vs.

DANIEL WIESE and SUE ANN WIESE,
NOEL CERVANTES and ARNEL CERVANTES,
MARK SAUGSTAD and KATHLEEN SAUGSTAD,

Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Richard Ullstrom
Routh & Crabtree, P.C.
Counsel of Record for Petitioners
P.O. Box 93350
3510 Spenard Road #204
Anchorage, Alaska 99509
(907) 258-3333

ARGUMENT

In their brief in opposition to the petition for writ of certiorari, respondents Wiese, Cervantes, and Saugstad address themselves to the merits of the Ninth Circuit's decisions in these cases, rather than to why certiorari should or should not be granted. They acknowledge that there is a conflict among the circuits over the issue presented by these cases. Because one side or the other of this conflict is presumably correct, the issue on a petition for writ of certiorari is not which side is right but whether the issue is of sufficient importance for this court to address. This court has already concluded that it is, by granting certiorari in Nobelman v. American Savings Bank, No. 92-641.

In addition to the conflict in authority, these cases raise the issue of whether the Ninth Circuit's decisions are

in conflict with the decision of this Court in Dewsnup v. Timm, ___ U.S. ____, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). Respondents argue that Dewsnup was limited to Chapter 7 liquidations, not a "reorganization" under Chapter 13, without explaining how this should impact the interpretation of Section 506(a) and (d). Those provisions apply in all Chapters of the Bankruptcy Code, and must be applied the same way in each Chapter. In re Blue Pacific Car Wash, 150 B.R. 434, 435 (W.D. Wis. 1993).

While pre-Code practice did permit stripdowns in reorganizations, the specific section cited by this Court in Dewsnup as an example of this, former 11 U.S.C. § 616(10), explicitly referred to "satisfaction or modification of liens," language carried over into the new Chapter 11 in § 1123(a)(5)(E). Despite respondents' bald assertion to the

contrary, Chapter 13 contains not one explicit provision allowing a lien to be reduced to the amount of the secured claim. Thus, respondents' effort to distinguish Dewsnup fails, so that this issue also merits the granting of certiorari.

The major new issue raised by respondents is the assertion that the Ninth Circuit's decision can be affirmed on the independent ground that petitioners have additional security, in the form of mortgage insurance, that takes petitioners outside the mortgagee clause of § 1322(b)(2). This argument was made by respondents Wiese to the Ninth Circuit, but effectively rejected by that court when it held that the mortgage insurance could not be taken into account in valuing the mortgagee's secured claim. The mortgage insurance cannot be additional security and yet have no effect on the

amount of the mortgagee's secured claim. Thus, to accept respondents' argument would require reversal of the Ninth Circuit on the mortgage insurance issue. Such a decision should not be reached without consideration of its impact on federal programs to encourage mortgage lending, such as HUD mortgage insurance and VA loan guaranties. Finally, the mortgage insurance is an interest which is contingent in nature, as it will not pay off unless the mortgagee is permitted to foreclose. The emerging consensus of the lower courts is that such contingent interests do not constitute additional security within the meaning of § 1322(b)(2). Matter of Washington, 967 F.2d 173, 174-5 (5th Cir. 1992). Accordingly, there is no alternative basis for affirming the Ninth Circuit, so that it is not appropriate to deny the petition for writ of certiorari.

Petitioners therefore respectfully request that their petition be granted.

DATED this _____ day of _____, 1993.

ROUTH & CRABTREE
ATTORNEYS AT LAW
A Professional Corporation
Attorneys for Petitioners,

By: _____
RICHARD ULLSTROM